UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JILL DILLARD, JESSA SEEWALD, JINGER VUOLO, and JOY DUGGAR, PLAINTIFFS

v. Civil No. 5:17-CV-5089

CITY OF SPRINGDALE, ARKANSAS; WASHINGTON COUNTY, ARKANSAS; KATHY O'KELLEY, in her individual and official capacities; ERNEST CATE, in his individual and official capacities; RICK HOYT, in his individual and official capacities; STEVE ZEGA, in his official capacity; BAUER PUBLISHING COMPANY, L.P.; BAUER MAGAZINE, L.P.; BAUER MEDIA GROUP, L.P.; BAUER, INC.; HEINRICH BAUER NORTH AMERICA, INC.; BAUER MEDIA GROUP USA, LLC; and DOES 1-10, inclusive. DEFENDANTS

TRANSCRIPT OF STATUS CONFERENCE

HELD VIA VIDEOCONFERENCE TECHNOLOGY

BEFORE THE HONORABLE TIMOTHY L. BROOKS

APRIL 29, 2021

FAYETTEVILLE, ARKANSAS

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THE COURT: The next matter on the Court's docket is the matter of Dillard and others versus the City of Springdale and others, Case Number 5:17-CV-05089.

The matter is before the Court for purposes of an interim status conference. We're proceeding by videoconference today. Let me announce appearances and try to orient myself to where everyone is on the video screen here.

The plaintiffs are represented by Jennifer Won. Good afternoon.

MS. WON: Good afternoon, Your Honor.

THE COURT: And then --

MS. WON: And also joined by my colleagues this afternoon.

THE COURT: Steven Bledsoe and Stephen Larson. Good afternoon, gentlemen.

MR. BLEDSOE: Good afternoon.

THE COURT: And then more locally, Shawn Daniels. Good afternoon, Mr. Daniels.

MR. DANIELS: Good afternoon, Your Honor.

THE COURT: Okay. And then on behalf of what I will call the Springdale defendants, looks like they are all in the same Zoom screen, Justin Eichmann, Tom Kieklak, and Susan Kendall. Good afternoon, counsel.

MR. KIEKLAK: Good afternoon, Judge.

THE COURT: And then we have Jason Owens representing the county defendants. Good afternoon, Mr. Owens.

MR. OWENS: Good afternoon, Your Honor.

THE COURT: So let me tee up our conversation a little bit.

The case here has had a complex and somewhat tortured procedural history up to this point in time. Various accusations and causes of action were made against, or by the plaintiffs against the City and certain officers acting on behalf of the City of Springdale and the release of certain investigative information pertaining to the plaintiffs when they were minors. The same accusation is made against Washington County.

The lawsuit here was originally filed four years ago. Four. Four years ago, May of 2017. At that time, there were some private parties named as defendants as well. The claims were numerous. Categorically, they included claims of defamation, invasion of privacy, that sort of thing. There were also civil rights claims brought against the City and the County for which the plaintiffs were seeking vindication of their Constitutional rights.

Along the way, various motions to dismiss were filed. Various motions asserting entitlement to qualified immunity were filed. This Court made certain rulings that

had the effect of dismissing the private entity defendants, but the Court left standing civil rights and some companion state law claims against the City and the County.

The Court's opinion denying qualified immunity was appealed and affirmed before en banc review was sought, at which time the en banc court reversed, or overruled, the panel decision and found, as to the civil rights claims, that the City and County were entitled to qualified immunity and that those claims should be dismissed. A writ was sought from the Supreme Court. That was ultimately denied.

And so from the original filing of the complaint on May 18, 2017, the steps that I just recited took until January 11th, 2021, so a few months ago, for it to reach the point where the Supreme Court denied the petition for writ that had been sought. Basically, they denied to accept the case. And so it made its way back for this Court to try the portions of the original claims that remain.

The original claims that remain categorically are two. First, we have the privacy claims. These are state claims under state law, but they are claims that this Court had pendant jurisdiction, or what we call supplemental jurisdiction of in the first instance, so they are properly -- they properly remain before the Court at this time. And

then in a separate category are some claims brought under the Arkansas Civil Rights Act. These were piggyback claims to the federal civil rights claims that were pursued. So that's all that's left to be tried.

On March 1st, two months ago, this Court entered a case management order setting the case for trial for nine and a half months later on September 20th. Is that nine and a half months? Eight and a half months? Way off in the fall. So filed the order on March 1st setting it for trial on September 20th, which seemed reasonable to the Court given that the matter was filed in 2017 and is literally, with one oddball exception, the oldest matter on this Court's docket.

The case management order set forth a glide path of tasks that the lawyers would need to complete and abide by to bring us in for a trial that would commence on September 20th. More recently, the Court chambers was contacted by the defense with significant concerns about the viability of the Court's glide path of tasks. The defendants believe that it's too aggressive and that there's too much remaining discovery, that it's just not feasible that the case can be tried on September 20th.

Essentially, a motion capturing these sentiments, which is styled as a "Motion for expansion of discovery scope and period," was filed on April 14th. And they

accurately lay out the history of the case, which I summarized. But they also point out that lots of fact witnesses that have been identified, we have all these damages issues, lots and lots of handwringing, and there's just no way we can get this done, it's impossible. And we need to have those deadlines extended, we need to have the trial date kicked down the road, and we need the Court to authorize more depositions and interrogatories than the rules would ordinarily envision.

To the Court's knowledge, the plaintiffs have not filed a response to the motion. I'm not sure whether -- technically, whether their time to file a response has run or not. It's close. But we did receive from Mr. Bledsoe an e-mail on April 15th that, to a certain extent, they agree that the timeline and glide path to trial is aggressive, but my take-away was that they are willing to meet it, and they think that they can meet it. Perhaps we can rearrange some of the dates, extend some of the individual line items within the scheduling order, but they think it's doable to try the case in September. And that's a high-level summary.

Then, this week, the defense files Document 109 which is titled, "Defendant's joint motion for dismissal with and without prejudice." The defendants point categorically to two different situations here. One is

these Arkansas Civil Rights Act claims, these state law claims, that were hanging out in the shadows of the federal civil rights claims that, after the appellate history of the case that I recited a few moments ago completed and had been disposed of, technically these ACRA claims are still there, although they are no longer in the shadow because there is nothing to cover them. And they say that for the same reasons that the federal civil rights claims have been dismissed, that the state civil rights claims should be dismissed as well, and with prejudice.

Separately from that issue, the defendants say, and while we're at it, there's some other state law claims, namely the substance of the plaintiffs' remaining claims, the privacy tort claims, that this Court has proper jurisdiction of, given the procedural history of the case, that those should be dismissed without prejudice so that the plaintiffs, if they choose, could refile them in state court. And basically the state court judge, they are sure, would be delighted to have this case tried in his or her venue and would have more time, you know, to work on stuff like this.

This was just filed a couple of days ago, so obviously, the Court wouldn't necessarily expect the plaintiffs to have filed a response yet. But we need to at least air some of these things out. Why don't we go after

the low-hanging fruit first.

The notion that the Arkansas civil rights claims should be dismissed with prejudice does not strike me as something that should be very controversial.

Who would like to address that for the plaintiffs?

MR. BLEDSOE: Your Honor, this is Steve Bledsoe. I think that's right. We wanted to take a -- our opposition to this motion I believe is due May 10th. We want to take just a quick look at that, but frankly, I think if they had approached us, we probably would have stipulated to the dismissal of these claims. So I think that's right, although Ms. Won, on our team, is taking a final look at that. We understood those claims would be gone, so unless we find something that surprises us, that's right.

THE COURT: All right. So we will certainly allow you to respond, but just kind of for planning purposes, we're thinking that the ACRA claims will go away.

And, again, your time hasn't run, but can you share any of your thinking on the defense suggestion that my colleagues down the street would be a much better venue to try the remaining claims and whether you join in that suggestion or not?

MR. BLEDSOE: Well, and I could do -- I have a

little argument on that, but I'll just give you, the short version is, the Court -- we have great respect for the Court. And Your Honor has put a lot of time, effort, and work into this case, and knows the case pretty well. I've been back to Arkansas in front of you a couple of times.

We think for purposes of fairness to the plaintiffs, who have been waiting to have their day in Court for four years, and judicial efficiency and kind of all those rules, that we're going to ask that this Court keep jurisdiction over this case and that it go to trial if not in September, then a reasonably short period of time. So we're going to oppose that aspect of the motion, for sure.

THE COURT: All right. Well, the Court will exercise restraint for the time being until it sees the official responsive position, but I don't think it's going to come as any surprise, given the amount of time that this Court has invested in this matter, and in the interest of judicial efficiency overall, the Court has proper jurisdiction. It does not envision a scenario, absent agreement of the parties especially, in which it is going to be what effectively would be granting a motion to remand. I'm just not going to do that. That's my inclination, subject to seeing the plaintiffs' response.

So from reading the tea leaves here, that means

that the remaining state law claims, which is to say the non-ACRA claims, remain for trial. And now we need to discuss why it is that we can't be ready to go to trial on September 20th.

In reading through the defendants' motion, having been in similar shoes in a prior lifetime, I get where you all are coming from. It seems like an incredibly daunting task. I certainly do not see anything inappropriate or untoward about you laying all of this out and asking the Court for this. And I am certainly willing to work with the parties on reframing some of the task deadlines and using any other tools available on the Court's tool belt to develop a glide past that will work better. I still would like to get the case to trial on September 20th. You may very well convince me that it just isn't possible, but your motion doesn't do that. Your motion says there's a lot of witnesses and we're going to have to take depositions and there are experts and this stuff takes time. Okay. Those statements are all true in the abstract.

But there was an initial Joint Rule 26 report that the parties filed in September of 2017. Ya'll have met before. The issues have been exhaustively briefed at every conceivable level of the federal court system. The facts as to what occurred as it relates to police report, police interviews, many years later, the subsequent release

of the statements, publication of those statements, there are large swaths that are not in dispute.

It occurs to me that the damages area is a little dicey because while the plaintiffs, through FOIA, probably know all there is for the defendants to say, the defendants do not know all that there is that the plaintiffs might say, especially on how damages are being calculated. Okay. That's fair. But if the Court could use some of the tools on its tool belt to shorten response times, to order ya'll to clear various weeks on your calendars so that we're going to set aside two weeks to take these 20-something fact witness depositions, and then we're going to pre-set aside another week or two for expert depositions, we can move some of the task deadlines back.

Although not ideal, we can still be conducting discovery into August. It's not ideal, I get it. But nor is it ideal that a case that has been pending for four years would be further continued. And what's layered on top of all of this is that, for the most part, for the last year, we've been under a jury trial moratorium in this district because of COVID. I think, and I'm proud of the fact that we have been able to move our docket along as well as we have. But there are just certain -- there's just a certain pile of cases where the litigants have represented to the Court that they are going to have to be

tried, and so every time we would extend the moratorium, we would have to kick their trial down the road again. So, I mean, from the Court's perspective, I feel a little bit like an air traffic controller in a bad storm. We have all these planes that are circling waiting for the skies to clear, and as soon as they do, we have one plane after another after another that needs to land.

And I appreciate that your calendars, this has all wreaked havoc on your calendars. And I get that. I understand that. But from my side of the ledger, this isn't as simple as, "Just give us three months." I don't have an opening three months out, unless I kick somebody else out of their slot. So I hear what you're saying. You may very well convince me that it's impossible. I have been in the trenches. Ya'll know that I have been in the trenches before I came to this position. I have empathy for your situation. I would not want to be you and what your summer would look like, and I'm empathetic towards that. But I'd like to try the case on September 20th. And if there is a way that ya'll can agree on deadlines to make that happen, that remains my -- that remains what the Court would like to do.

All right. I've said my spiel. My understanding, Mr. Bledsoe, I've kind of told you what my understanding of the plaintiffs' position is, but I'm just

working from your e-mail. Before I turn to the defendants and let them attempt to persuade me otherwise, what is the plaintiffs' position?

MR. BLEDSOE: We would like to keep the September 20 trial date as well, Your Honor. I will say a little bit of new information. I didn't have this information at the time I sent my e-mail because our expert reports weren't as far along, and I wasn't sure what the damages claims were.

But we are streamlining this case. We are not seeking -- we're not going to seek any damages for lost wages, lost past earnings, or lost future earnings. The categories of damages we're going to seek, it's basically all going to be based on the witnesses' testimony. And our experts would be a life care plan involving the cost of therapeutic intervention in these four women's lives over a period of time to address the emotional issues that are arisen from this nationwide disclosure since they're public figures. And then the emotional distress type damages and punitive damages. So that removes kind of a major element of deposition and even expert work from this case.

So we're happy to work with the defendants on deadlines. But the depositions, we don't think they need 25 depositions, but if they want to take 25 depositions, I'm not going to light myself on fire to stop that. But

this is not a case that I think is going to be ripe for summary judgment for either party, so the summary judgment dates are for the most part irrelevant. We'll be ready to produce our expert reports on Monday. They'll see what we are claiming, because that was the date, May 3rd, and then we can go forward with depositions.

We're going to put on a pretty streamlined, direct case. We're not going to lard it up with a bunch of additional extraneous witnesses, so I think we can get it done. I don't think they need 25 depositions. If they want to take 15, I mean, one of the positions that he says, oh, we need to depose people to see who held documents. Well, clearly, more than just the immediate family and the police department -- I'll just give this as an example -- knew something had happened to someone. But the way they are pursuing this we don't think is a defense, because there's no question that the public at large and the nation at large was not aware of who did what to whom specific.

I mean, it just is -- a lot of what they have asked for we think is not proper or not even going to be a valid defense. But I'm not going to light myself on fire to stop them from taking depositions if they think they need it. We think we can extend the fact cutoff date and get everything done, because the summary judgment date is really going to be irrelevant from our perspective on that.

That's the short -- that's kind of the short version of our position, I guess. Maybe not so short.

THE COURT: Okay. But just to be sure I understand what you're saying about damages, the plaintiffs were on a television program that ultimately was canceled, and at least there was a temporal relationship to the canceling of that programming with the disclosures that were made.

Do I hear you saying that the plaintiffs are not seeking any damages from any resulting economic impact of the disclosure of this information on their T.V. careers, for lack of a better term?

MR. BLEDSOE: That is correct, Your Honor. And you didn't really ask the question, but, frankly, on the way the T.V. show was set up, the family got most of the money. The girls were working, I don't know what the numbers were, but for 15 or 20 dollars an hour. That aspect of the case would take more trouble to try, cost more in experts than we think makes sense, because we think that the guts of the case is the emotional damages and cost to these girls.

THE COURT: Okay. All right. Thank you very much. I'm going to mute ya'll, Mr. Bledsoe, or you can. Thank you.

Mr. Eichmann, you want to go first? Mr. Kieklak,

who wants to go first?

MR. EICHMANN: Your Honor, may it please the Court. Thank you very much for your time. I want to make sure you hear me all right, Judge Brooks.

THE COURT: I can hear you, but I can't see who you are. Let me change my view. There we go. I've got you on full screen.

MR. KIEKLAK: Oh, I'm sorry to hear that.

So, Your Honor, again, may it please the Court, and thank you for hearing us. Justin and Susan are in the room with me, and I know that Jason put a lot of work into the motion. I'm sure he's going to want to speak too, so I won't take all of that thunder away, if that's okay, Your Honor.

But what I want to start off with is what opposing counsel just ended with. And it is striking. It is striking, Your Honor. Opposing counsel just suggested that you don't need to have a summary judgment deadline in this case. Let's look back real quick about your exposition of the case. Everything that you mentioned in those four years occurred on the complaint, on the complaint itself. The issues were not joined until after the Eighth Circuit -- I'm sorry -- after the Supreme Court denied Cert. The issues were not joined until then. So you haven't considered in this case, Your Honor, a single

fact that is a fact as the kind of facts that the Court or a jury finds after the issues are joined. It's never -- no fact has ever been introduced to you; only allegations. And now you have the plaintiff telling you that you won't even need summary judgment.

Your Honor, there's a story that the Court has no idea exists. And that story has several pieces. And they relate both to liability in this case under the remaining claims, and of course to damages. And, Your Honor, I think we all hear you loud and clear. I know I do hear you loud and clear. And I want to say right away, you tell us to try this case in September, we will try this case in September. It's that simple. We will. But I wanted to explain to you a little bit more about what we're thinking and try to take it out of the, you know, "We have busy calendars, it's just not possible," to what this case really is about and what really is going on out there.

So I think your order in March did set a trial, I think in six months. And we are accustomed to a case management hearing before the Court. And the Court has educated us on the value of those and the way the Court conducts them and how useful they can be in not just narrowing topics, but focusing on discovery, the kind of things that will need to be done and methods that will be used. We haven't had that in this case.

The Rule 26 report that you mentioned, Your Honor, these plaintiffs -- these defendants, Springdale and Washington County, were not a part of that. We did not participate in that because we had, at that point, received a stay from the Court on disclosures and a stay from discovery. And that stay remained in effect -- actually, I'm sure it's been formally removed, but certainly we would consider it removed now that the administrative stay has been lifted. So we had not participated -- we have not -- until the ensuing weeks. We have worked with opposing counsel now, and I must say very cordially, if I may, regarding disclosures and having sort of a Rule 26 initial meeting that you would require. That had not been done until now. That had not been done until the recent weeks. And so while the case is very old, we really are beginning the case now.

Your Honor, you might say, "Well, what have you been doing for four years?" And of course there was briefing, quite a bit of briefing. And in addition to that, we have undergone some investigation. Not intensively, but some investigation. And one of the reasons is, is because of the very, very sort of persistent information, as I think opposing counsel alluded to, that the allegations in the police report were known in the community. And in fact the existence of the police report,

and even perhaps copies of the police report were known in the community. And so when opposing counsel -- and I don't blame him -- dismisses that fact by saying, "Well, we do know this, it wasn't known to the country." Well, we don't know that, Your Honor. Nor do we know what the legal distinction is under these two state torts, which I believe Your Honor has described as "novel" in your opinions, Your Honor.

What's the distinction between five people or 50 or 500 knowing? Or people in one state, or two states, or four states? Or maybe the entire internet knowing about the allegations, about the abuse, and about the police involvement? And so we believe that it is important to our clients, to the defendants, and they deserve a thorough investigation of that and discovery in that, which we have begun and we are now doing in earnest. And we believe that they are entitled to that because that may very well be a bar to recovery. In other words, it may go to liability, which would be properly brought to you under Rule 56, Your Honor, which we fully intend to do if those facts bear out like they are being indicated right now.

Just as an example --

THE COURT: Let me just interrupt on this one point.

I hear what you're saying about the matter

spending time on appeal, that you being granted stay not to do certain things pending the Court's rulings. This whole thing about the administrative stay. The term "administrative," that's a courtside, back-office entry. The Court never stayed your ability, certainly not after the Supreme Court ruled, to start working on the case.

But separate and apart from all of that, the rules of discovery envision that there are certain things that you can do to make discovery about the other side's case, the formal mechanisms by which you do that, the written discovery, the noticing of depositions. But what you've just transitioned to start talking about is your side of the case and your own investigation. And I don't understand under what procedural rule or order that you were barred from representing your clients and conducting your own investigation for the last four years.

MR. KIEKLAK: Very fair, Your Honor.

What we will require now to present facts in court and possibly to the jury are third-party depositions, and maybe third-party discovery. In other words, one of the most well known is that when the family was going to be on the Oprah show a few years ago, a tip was given to the Oprah show producers about the abuse. This was several years prior to the FOIA release. And the Oprah producers did enough investigation to where they canceled the show

and made a call to the hotline that eventually generated the police investigation. So we know that there are people who we need to establish in Illinois that knew about the abuse, how they found out about it, and to what extent they spread that information.

We also know that in paragraph 51 of the complaint itself, the plaintiffs allege that the magazine that published it indicated that they knew about the existence of the abuse and the report. They were seeking a copy of it, an official copy of it, perhaps. They may have already had another copy, but wanted cover before they published. There again, that allegation is their allegation so we need to nail that down again with third-party discovery, probably of the people who were at the magazine, which I believe that's New Jersey and Los Angeles.

And so when we are talking about that sort of far-flung discovery -- and, again, that's a result of our investigation -- but we need to now nail that down with the discovery rules, the federal discovery rules, Your Honor. And so those are some of the reasons that we were thinking, whew, we've got a lot to do in six months.

And I need to be very candid with the Court. At the time of that motion, we had a conflict as well. Two of us were in trial. That trial just got moved, Your Honor,

this week, in fact yesterday to another date down the road. So we no longer have an actual conflict with two trials. I wanted to make sure the Court was aware of that, much as I'm chagrined to say. So we don't have a conflict.

And so those things, the fact that we're in discovery now where I don't know that we would have been able to conduct actual depositions and use subpoenas of the Court prior to when the Court had jurisdiction. Those are a few things I wanted to mention. There are some more details that Jason may want to go through. And, Judge, I would like to answer any questions you may have about that.

THE COURT: All right. Thank you, Mr. Kieklak.

Mr. Owens?

MR. OWENS: Thank you, Your Honor.

Good afternoon. A couple of points that I would add. Tom brought up that the public defendants, which would be the County and the City folks, were not part of the Rule 26 report that was filed earlier in this case. That's accurate. We are not signatories to that report.

In that report, the plaintiffs and the private defendants agreed that 12 months would be an appropriate time to conduct discovery in this case. They also agreed at that point that they didn't envision any expert testimony in the case at that time. Now they do envision expert testimony, but think that the discovery deadline

should be three months instead of 12. The damages claims are identical except for the concession that was made moments ago, and there was an e-mail to that effect a few days ago, I believe.

It's the defendants' position that we still need to conduct some probably rather substantial discovery on economic condition, because the economic condition of these plaintiffs substantially improved after these disclosures precisely because, it's our understanding, they chose to sell this story in various ways, both on television and in an upcoming book, I believe, and in other manners. And that's obviously very relevant to these questions of harm and the need for therapeutic intervention, particularly in the long term, which is apparently where the plaintiffs have shifted on damages. Certainly, they have changed from thinking there would be no expert witnesses to now there are going to be expert witnesses first part of next week. All of those things we think stretch out the appeal deadline -- not the appeal deadline, I'm sorry -- the discovery deadline.

I would also point out that, as Tom said, the Washington County defendants certainly anticipate filing a motion for summary judgment in this case. And I would certainly anticipate that we would raise the defense of qualified immunity again. The Supreme Court has

specifically held that that defense can be raised both at the motion to dismiss and the summary judgment phase. Obviously, I can't prognosticate about the likelihood of any further interlocutory appeals in this case because we don't know how the facts are going to shake out, and certainly don't know how the Court would rule based on the full factual recitations of all the parties.

But I did want to raise that to the Court just so that there's no surprise for anyone, that this is the way the defendants see the case. That we certainly intend to make motions for summary judgment to allow the Court to see all of the facts that we're able to discover, which I think will take significant, not only discovery in the normal sense of deposing the seven parties and the 21 witnesses that the plaintiffs have disclosed, in addition to the expert witnesses that they have not yet disclosed. But these will be all over the country. We anticipate we will do discovery, at least currently in Chicago, in Los Angeles, in New York. And all that just takes some time.

I certainly would agree with Tom. We will jump on it with all vigor and pursue this as quickly as the Court orders. But we just wanted to let the Court know what's behind our request here.

THE COURT: I'm trying to get my mind wrapped around something that you just said.

MR. OWENS: Yes, Your Honor.

THE COURT: Which is that it would be your intention under Rule 56 to file a dispositive motion based on qualified immunity.

MR. OWENS: Yes, Your Honor.

THE COURT: And hypothetically, if the Court denied your motion, are you suggesting that you would procedurally be entitled to a second interlocutory appeal?

MR. OWENS: It's my understanding of the law, Your Honor, is that there are entitlements to raise qualified immunity, including through an interlocutory appeal, at both phases of the pretrial case.

I apologize that I don't have a citation on that. I've previously done the research on that, Your Honor. I believe there's a Supreme Court case, and I'll find that and send that to the Court's attention. I apologize for not having it today.

THE COURT: Well, I consider you a subject matter expert in this field, so I take what you're saying at face value. If you would find that cite and send it to me. I'm still trying to get my mind wrapped around that. And, frankly, that's not something that I had considered would be possible, so please do that.

MR. BLEDSOE: Your Honor, could I address one issue?

THE COURT: Please.

MR. BLEDSOE: If they want to take a bunch of depositions, like I mentioned before, frankly, we're not going to light ourselves on fire to oppose that. But I will say, and this is kind of maybe the only area in life where COVID has sped up things. These depositions are going to happen over Zoom. People aren't going to be flying into Jersey and Los Angeles and Chicago. Frankly, it's a lot easier to get these things scheduled and get them done quickly when you don't have to travel.

So if they want to take their depositions, I think 25 seems like a pretty large number, and I doubt that actually, frankly, they will actually get anywhere close to that. I think a lot of this is posturing to get a continuance. But with the advent of Zoom depositions, these could all be done if we just extended the fact discovery cutoff to August 6th as we already essentially tacitly agreed to.

THE COURT: So you mentioned earlier that you've scaled back your damages theory. When and in what format do you plan to lay that out for the defendants?

MR. BLEDSOE: The damages that we'll be seeking, I've sent them a couple of e-mails, but I realize that's not formal. Our damages theories will be laid out in the expert reports. Because the expert reports will include

essentially a damage figure, a specific dollar amount for a life care type plan. And then suggest that the -- it will discuss in detail the emotional distress, anguish and pain and suffering essentially caused by this conduct. And then that's going to be left up to the jury. I don't have a number for that. That's something that's going to be squarely within the province of the jury.

THE COURT: Right. And that's Monday, then?

MR. BLEDSOE: Yes.

THE COURT: All right. Let me throw out a suggestion and what the Court would be inclined to do as it relates to expanding the scope of discovery permissible under the rules.

I hear where the defendants are coming from. There is a certain good deal of merit to their argument. I don't completely buy the notion that something has prevented them from investigating things, because they have been representing these clients for well over four years at this point, and there's nothing under the rules that would have prevented them from running down witnesses and that sort of thing. The only way they have been hamstrung is in perpetuating testimony or formal interrogatories among the parties. But third-party discovery or third-party investigations, I mean, they've had four years to do that.

Nevertheless, here's where we find ourselves. I

would like the parties, upon completion of this phone call, to either stay on the line, we'll move you to your own private Zoom room or whatever we need to do. But either today, or if you would prefer certainly by the end of the day tomorrow, to figure out when ya'll can block off a half day, if it takes that much on your calendars, sometime after Monday, but preferably next week, to take a hard look. This will be after the defendants will know what the damages theory is going to be. To get a calendar out and to take a hard look at scheduling depositions and revising dates on the Court's glide path, if you need to, and basically to work this out among yourselves. And if you need an order of the Court to shorten the time to do things, if you need the Court's assistance in requiring people to appear, whatever the case may be, the Court will help out.

In terms of expanding the scope of discovery, I'm not just going to blindly expand it, especially if there's opposition, to 21 or 25, whatever the request was, in one bite. What seems more logical would be to, let's say expand it to 15 initially. Take those 15 depositions. This will force the parties to prioritize who it is that they are deposing. After you have used up those 15 depositions, then you're in a much better position to come back to the Court and say, "Here's how we have used our 15,

there are still two more, five more, 10 more, depositions that are crucial for us to take for these reasons." That lets the Court -- it gives the Court better information to go on, rather than just this abstract notion that, "We need 25 because we just think it's going to take that many."

So when you sit down and talk about it, understand that at least the first cut is, you are going to be limited -- the Court will expand it, but the limit will be 15 per side. In this conference, I also want you to identify days or blocks of weeks in the near future when, even if you don't have the names of who is going to be deposed, even if you haven't sent out the notices yet, you at least have these days reserved on your respective calendars.

Through the course of your meeting and conferring, through the course of the plaintiffs' better understanding how the defendants potentially would be prejudiced by this timeline, maybe ya'll come back to the Court with a status report that I will require and you agree. And through that mechanism, maybe the Court would entertain moving the case. But I'm not going to move it, I'm not going to move the trial until ya'll have seriously sat down across the table, so to speak, and explored a pathway forward that will preserve this September 20th date.

If you both do it in good faith and come back and say, "It can't be done," I would be inclined to go along with that, understanding that I have no idea when I will be able to get you back in. If you can't agree, then in the status report that you will submit, the defendants can further refine exactly what the stumbling blocks are with more specificity. I understand the big picture that you've laid out in your motion and that you have argued today. But in your status report following your good faith meet and confer, you can add some more context and some more specificity as to what the particular stumbling block is. And understand if it's running down the names of some witnesses that you could have been doing in the last four years and you need more time to do that, that won't be very persuasive. But if there are more structural things, I haven't made up my mind. I will still hear you out. But I would like ya'll to meet and confer soon, and I would like a joint status report e-mailed to chambers by no later than the end of business on May 10th.

And this will be a report of your meeting, what you were able to agree on in terms of agreements to dates that are currently in the case management order, agreements to modifying certain of those dates. And then each side can have a section in the joint report where you state your position at that point in time and why you disagree with

the other side, if you do disagree.

And like I said, if you come back after a good faith conferral process and you're agreed that it can't be done, well, I'll have to take a look at that. I just don't know when I would be able to get you in. And then I would also appreciate, as I said, Mr. Owens sending us that case, because that is a potential wrench that the Court hadn't even considered.

MR. OWENS: Well, one of the other advantages of being able to do these hearings on Zoom is the ability to do such research while you're sitting here.

The case is *Behrens v. Pelletier*. That's an Arkansas pronunciation. But it's 516 U.S. 299. 516 U.S. 299. It's a 1996 decision.

THE COURT: '96?

MR. OWENS: And it held that -- the question was whether you can take a second interlocutory appeal after your interlocutory appeal on a motion to dismiss was rejected. And the Supreme Court answered yes.

THE COURT: The law on qualified immunity has reinvented itself three times since '96.

MR. OWENS: At least.

THE COURT: Okay. We'll take a look at that.

MR. OWENS: Thank you, Your Honor.

MR. BLEDSOE: Your Honor, can I raise one more

issue?

THE COURT: Yes.

MR. BLEDSOE: I hesitate to do that because I'm actually late for a meeting.

Would Your Honor in this type of case where I would say that the expert reports are going to contain very personal and private information, including information on marital relations, would Your Honor entertain a protective order with the additional "attorneys' eyes only" level of protection?

This is about as sensitive as it gets, so I just want to raise that issue. Because otherwise, we will just stipulate to the other one, because we need to get a protective order in place pretty quickly.

THE COURT: I will certainly entertain it. Please confer with the other side. Certainly, if you agree, that's fine.

MR. BLEDSOE: We will discuss that in our conference. Because we've proposed it, but we haven't heard back from them. But I think there was maybe some concern that, Your Honor, those were disfavored. But I think this is a pretty unique situation.

THE COURT: I agree. I agree.

MR. BLEDSOE: Thank you, Your Honor.

THE COURT: All right. I don't know where you

all are physically situated, so let me offer you a couple of options here.

Ya'll can just agree on the record now to get together later today or tomorrow to set a date next week for your meet and confer, or we can segregate you off into a private Zoom room and ya'll can continue the discussion right now.

What would you prefer, Mr. Bledsoe?

MR. BLEDSOE: Your Honor, Mr. Larson and I are actually in Logan, Utah, in a diner because we're headed to a client meeting. We flew up here this morning.

So what I would suggest is that we -- we've had really good relations with the other party. We've had no trouble scheduling meet and confers so far. So I would suggest, I'll send out an e-mail on my way to the meeting suggesting some times tomorrow or Monday, and then we will do it that way, if that's okay.

THE COURT: That's fine. That's fine.

MR. BLEDSOE: Okay.

THE COURT: All right. Anything else from the defense, Mr. Kieklak?

MR. KIEKLAK: Thank you, Your Honor. I think in that meet and confer, we will handle some of the other disclosure issues as well, Your Honor. We'll try to get as much of that done as we can. So thank you.

THE COURT: All right. Anything else, Mr. Owens?

MR. OWENS: No, Your Honor. Thank you.

THE COURT: All right. Thank you all very much. I appreciate it. We'll go off the record.

(proceedings concluded at 2:45 p.m.)

C E R T I F I C A T E

I, Paula K. Barden, CCR, RPR, RMR, Federal Official Court Reporter, in and for the United States District Court for the Western District of Arkansas, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of May 2021.

Paula K. Barden, CCR, RPR, RMR, # 700
Federal Official Court Reporter
Western District of Arkansas

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